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In the Supreme Court of the United States

OCTOBER TERM, 1963

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,
Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MINNESOTA MINING AND MANUFACTURING COMPANY IN OPPOSITION

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THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,
Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MINNESOTA MINING AND MANUFACTURING COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 314 F.2d 369 and reprinted as an appendix to the petition at pages 19-38. Petitioner's Memorandum and Order in the district court denying respondent's motion to transfer, entered August 31, 1962, is reported unofficially in 1962

Trade Cas. ¶ 70,455 (E.D. Ill. 1962) and is reprinted herein as an appendix (pp. 25-35, *infra*).[1]

QUESTION PRESENTED

1. The only question presented is whether the court of appeals abused the discretion granted it under the All Writs Act when it ordered petitioner to allow defendant's transfer motion on this record where (a) petitioner's denial of the motion was based on a concededly improper consideration constituting an abuse of the discretion vested in him under Rule 21(b), (b) the uncontested record facts demonstrate that allowance of defendant's motion to transfer is in the interest of justice, and (c) petitioner had fully considered the relevant and uncontested record facts and had found in them no basis for denial of the motion to transfer.

2. Petitioner suggests that a second issue is "whether district judges, in determining whether a transfer would be in the 'interest of justice' under Rule 21(b), are required to give heavy or dispositive weight to evidence that the proposed transferee district is the headquarters, or

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[1] Throughout this brief, Chief Judge Platt is referred to as "petitioner" and Minnesota Mining and Manufacturing Company as "defendant." The district court opinion reprinted as the appendix hereto is cited "DCO .....;" the petition for a writ of certiorari and the court of appeals' opinion reprinted as the appendix thereto is cited "Pet. .....;" defendant's appendix in the court of appeals is cited "Pet. App. .....;" Judge Platt's appendix in the court of appeals is cited "R. App. ....." and his answer to the rule to show cause is cited "R. Ans. ....."

'home district', of a corporate defendant" (Pet. 3). While defendant urges that that fact is entitled to great weight, the record here fully supports the conclusions reached by the court of appeals, and the propriety of its writ, irrespective of the fact that the proposed transferee district is defendant's home district. Accordingly, the record here does not present the second question raised by petitioner.

RULES AND STATUTES INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

STATEMENT

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals of the Seventh Circuit which awarded defendant a writ of mandamus ordering petitioner "to vacate his order denying [defendant's] motion for

transfer, and ordering him to transfer [this criminal action] . . . to the district of Minnesota." (Pet. 31). The decision of the court of appeals notes that petitioner denied the motion to transfer because he "believed that there was a likelihood of the Government not receiving a fair jury trial in Minnesota" (Pet. 21, 26) and held that "no order in any way based upon such reasoning can stand . . ." (Pet. 30). The petition does not contest the correctness of the appellate court's determination that consideration of the "fair trial" argument by the petitioner was error nor does it contest the availability of mandamus to correct this conceded abuse of discretion. It is urged only that the writ should have directed petitioner to reconsider the issue in the light of a proper standard instead of directing him to transfer the action forthwith (Pet. 12, n. 2).

This is a criminal action brought in Danville in the Eastern District of Illinois for alleged violations of the Sherman Act dating, according to the indictment, as far back as 1931 (Pet. App. 104). The record facts held by the court of appeals and here conceded by petitioner to be relevant to defendant's motion under Rule 21(b) to transfer this criminal action to its home district of Minnesota were considered both in petitioner's memorandum opinion in the district court denying the motion and in the opinion of the court of appeals. The opinion of the court of appeals contains the following summary of the record (Pet. 31, n. 3):

> "A trial in the Eastern District of Illinois will result in unjustifiable increased expenses to [defendant] of at least $100,000, great inconvenience of witnesses,

serious disruption of business and interference of contact between the [defendant's] executives and its trial attorneys in connection with protracted antitrust prosecution trial.

"[Defendant] has no office, plant or other facility in the Eastern District of Illinois.

"There is no serious congestion in the docket of the District Court of Minnesota, while a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them."

The appellate court held that the record facts so summarized comprise a "demonstration by proof or admission of the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case . . ." (Pet. 30-31). Here, the court added, the weight to be accorded that demonstration was augmented by the additional consideration that the motion was to transfer a *criminal* action to the defendant's home district (Pet. 31). The court concluded that such a record compelled the grant of the motion to transfer under Rule 21(b) (Pet. 31).

The legal conclusion so reached by the court of appeals is consistent with petitioner's memorandum opinion and is based squarely on the record, on facts established by affidavits and uncontroverted by the Government. From petitioner's opinion it is clear that respondent has no physical facility—plant, office, or laboratory—within the Eastern District of Illinois (DCO 27; Pet. App. 16, 21); that none of those named as co-conspirators in the indict-

ment are located in the Eastern District of Illinois (DCO 27); that (contrary to the assertion made on petitioner's behalf here) no known prospective witness, for defendant or for the Government, lives in the Eastern District of Illinois (DCO 28-29; Pet. App. 53-54, 67; R. App. 74); that the offices of the attorneys for both parties (except for defendant's local attorney in Danville) are outside the Eastern District of Illinois (DCO 31); that no documentary evidence relevant to this cause originated within the Eastern District of Illinois and that "it would be an inconvenience for the defendant to locate and transport the necessary documents . . . to Danville . . ." (DCO 30; Pet. App. 18; 47-49); that, as petitioner found, "there can be little doubt that if the trial occurred in St. Paul there would be less disruption of defendant's business" (DCO 30) and, furthermore, that trial in Danville "would be more expensive to defendant" (DCO 30).

The uncontradicted record shows that the District of Minnesota is, as petitioner found, "the home district of the defendant" (DCO 27, 30); its general and administrative offices, main research laboratories, and several manufacturing plants are located there (DCO 27). All of the defendant's officers and employees most familiar with the matters put in issue by the indictment, whose presence will be required in preparation for and during the trial, live and work in the Twin City area (Pet. App. 18-20); defendant's legal department and patent lawyers are located in St. Paul (DCO 31); the personal contact between lawyer and client necessary before and during trial of complex antitrust and patent issues would be possible only

in the District of Minnesota (DCO 30). Patent license negotiations relevant to the charges of the indictment took place in the Minnesota district (Pet. App. 23, 26, 30, 34-35, 39-40).

At least twelve defense witnesses (Pet. App. 20-21, 27, 31-32, 36, 41, 57) and eleven witnesses called before the grand jury in Danville are located in the Minnesota district (Pet. App. 54, 57); other known witnesses on both sides located throughout the country will find the Minneapolis-St. Paul area vastly more accessible than Danville (Pet. App. 54-57): St. Paul is served daily by 100 airplanes, of which 36 are from Chicago, and eight trains from Chicago, as compared to eight planes (three from Chicago) and five trains (three from Chicago) to Danville (DCO 31-32; Pet. App. 55-56, 60-63).[2] Defendant's gen-

[2] Throughout the proceedings in the district court, attorneys for the Government refused (and petitioner sustained the refusal) to reveal even the location of the witnesses they expected to call (Pet. App. 132-133, 141). Government attorneys were careful to avoid any specific claim that any witness whom the Government intended to call could be found in the Eastern District of Illinois (Pet. App. 67; R. App. 74). The government suggested only that that if the court were to consider areas of 300-mile radii around the two proposed forums, more of its witnesses would be found in the arbitrary area proposed for Danville than for St. Paul. (Pet. App. 67). But the suggested Danville area includes Chicago, where several witnesses on both sides can certainly be found; there can scarcely be any dispute, however, that it is easier to get to St. Paul than to Danville from Chicago, even though the distance in miles is somewhat greater (Pet. App. 55-56). Defendant's showing on witnesses was not limited to its own witnesses (Pet. App. 53-54); its affidavits demonstrate not only that St. Paul is overwhelmingly more convenient for its witnesses but also for the 42 witnesses known to the defendant to have testified before the Danville grand jury (Pet. App. 53-54).

eral corporate files (4000 file drawers concern products involved in the indictment), its operating division files (over 300 drawers), its patent attorneys' files (15 cabinets), and its copies of 15,000 documents furnished to the Government and Grand Jury are located in St. Paul (DCO 30; Pet. App. 18, 47-48). The record also details the great and serious disruption of defendant's business operations that a Danville trial would cause (Pet. App. 18-20, 30-31, 35-36, 40-41, 47-49), a disruption which would be greatly reduced and minimized were the trial held in St. Paul (DCO 30). The record establishes, moreover, that the cost of trial to defendant would be less in St. Paul (DCO 30), as compared to Danville, by at least $100,000 (Pet. App. 22, 52).

These record facts, while not stressed in petitioner's memorandum opinion, were neither refuted nor left unconsidered by him. It is clear from his opinion that petitioner thought the trial should be held in Danville because the Government could not obtain a fair trial in Minnesota (DCO 34-35). His discussion of other record facts demonstrates that he considered them only to justify retention of the case in Danville (DCO 27-33). Indeed, his consideration of these facts dwells on their adequacy to demonstrate that a defense *could* be managed in Danville, not whether the trial *should* be held there.

Petitioner's affirmative conclusion on the feasibility of a Danville defense appears from his opinion to have been based on evidence that defendant had once appeared as an involuntary party plaintiff in an infringement suit brought in East St. Louis, within the Eastern District of Illinois (DCO 29; Pet. App. 43-44, 66, 133); that defendant could

prepare for trial by long-distance telephone (DCO 30); and that Danville itself is served, albeit with relative infrequency, by commercial planes and trains from Chicago, could be reached by defendant's private planes, and, moreover, can be reached from the Minneapolis-St. Paul area by automobile after a drive of only twelve successive hours (DCO 31-33).

The memorandum also records such facts as the record affords tying the case to Danville: that the Government has already delivered documents, in nine neatly packed file boxes, to Danville (DCO 29) and that the Government asserts that the total amount it would have to pay in witness fees would be less by an undetermined amount for a trial held in Danville rather than in Minnesota (DCO 31), even though no known Government witness actually is to be found in the Danville district (Pet. App. 54, 67; R. App. 74). Petitioner's only statement favoring Danville, that "without a doubt" a trial could be had sooner in Danville than in St. Paul (DCO 33), is based on an apparent intention to arrange an early trial rather than on the record showing that the dockets in both of the districts in question are current, the average case load per judge being 163.5 in the Eastern District of Illinois and 141.5 in the Minnesota district (Pet. App. 24, 58, 94-95).

In his answer to the court of appeals' order to show cause, petitioner departed from the text of his memorandum opinion to assert that the fair trial consideration was but one of several bases for his denial of the transfer motion (R. Ans. 3-5); this restatement is set forth in full at pages 9-10 of the petition. The other considerations to which he pointed are, however, either mere assertions

that the district court has venue (DCO 29), which is not the issue under the transfer motion, or are wholly unsubstantiated by the record. There is nothing in the record to show, as was there averred (R. Ans. 4), that transfer would delay trial a year or, for that matter, that a period of a year for preparation would be unreasonable in view of the complexities of the charges of the indictment.[3] The statement that "a speedy trial was necessary because some of petitioner's competitors are in financial straits owing to petitioner's alleged conduct and to the fact that petitioner has refused to halt its allegedly illegal activities," surprising in the light of the presumption of innocence accorded to defendants in criminal cases, is based on the avowal of the prosecuting attorneys rather than on any factual showing (R. Ans. 4). General "avowals" are also, as already noted, the only support for petitioner's suggestion that the Government's witnesses would be inconvenienced and its overall payment in witness fees increased if the trial were held in Minnesota (DCO 31; Pet. 7; R. Ans. 4).

Petitioner's further observation—that respondent "has operated on a nation-wide scale . . . in the industries here involved; that there is support for the Government's avowal that petitioner's overt acts have substantially affected the residents of the Eastern District of Illinois; that this is not an 'imported case' . . ." (R. Ans. 4)—relates

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[3] It should be noted that the indictment covers a 30 year period and that since 1945 (not 1958, as stated in the petition, Pet. 3) the prosecution has been gathering information and documents from defendant's files (Pet. App. 16-17; R. App. 32-33).

obviously only to the question of venue. In fact, on the record made on the transfer motion, even venue in the Eastern District of Illinois is questionable as is shown in petitioner's memorandum opinion in which he brushed the problem aside with the statement that "the defendant will not suffer if the Government should fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed" (DCO 29).[4]

REASONS FOR OPPOSING THE WRIT

I. The Form of the Writ of Mandamus is Proper.

The decision of the court of appeals rests, as the preceding statement of facts shows (*supra*, pp. 3-11), on the peculiar facts of this record. This is a *criminal* action against a single defendant arbitrarily brought in a district which has little if any connection with matters alleged in the indictment. The petition states unequivocal-

[4] Venue in both proposed forums was stipulated, but only for purposes of the arguments on the transfer motion (Pet. App. 149). The Government's showing on the transfer motion certainly does little to show venue in the Eastern District of Illinois. On one product line involved in the indictment there is no record evidence indicating the existence of venue there; on the other two product lines the prosecution has pointed to two letters (dated 1953 and 1958) that refer to customers located in the Eastern District of Illinois (R. App. 50) and defendant's appearance as an involuntary party plaintiff in the Eastern District of Illinois (Pet. App. 43-44, 66, 133). While the prosecution claims that the subject matter of that suit is involved here (Pet. App. 132-133), it is only one of 34 patent infringement suits about which it makes the same claim (Pet. App. 69-75).

ly that "the correctness of the Seventh Circuit's holding that it was impermissible to take into account the difficulty of assembling an unbiased jury . . ." in the transferee district is uncontested (Pet. 12). The petition argues (Pet. 13-15) only that the writ should have ordered a remand, a position that concedes that the issuance of a writ of mandamus was proper in the circumstances presented by this record. The petition to this Court reduces to a claim that the court of appeals abused its discretion when it worded the writ to direct immediate transfer instead of allowing petitioner a second opportunity to review the record and decide the motion (Pet. 15).

A. The Appellate Court's Direction to Transfer Was Compelled by the Record Facts.

The court of appeals, in ordering transfer of this criminal case, acted under "the supplementary review power conferred on the courts by Congress in the All Writs Act" which this Court has held is meant to "be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' . . ." *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953). Obedient to the mandate of this Court, the Seventh Circuit has consistently refused to exercise powers of mandamus when lower court dispositions of transfer motions were based on errors insufficient to constitute abuses of discretion. *E.g.*, *A. C. Nielsen Co.* v. *Hoffman*, 270 F. 2d 693 (7th Cir., 1959); *Sypert* v. *Miner*, 266 F. 2d 196 (7th Cir.), *cert. denied* 361 U.S. 832 (1959). In this case consideration of the "fair trial" issue was clear and obvious error which, as the appellate court recognized (Pet. 30) and the peti-

tion here concedes (Pet. 12), constituted an abuse of discretion correctable by mandamus.[5]

Petitioner found the difficulty of getting a fair and impartial jury in Minnesota "*material* in determining where the cause should be tried" (DCO 35, emphasis supplied). But his discussion ranged throughout the record and, although he made no finding on the basis of relevant facts which indicated that the transfer should be denied, it was argued to the court of appeals that his decision was based on several factors (R. Ans. 3). The court of appeals was therefore *compelled* to look at the record underlying the lower court's memorandum to ascertain whether petitioner's decision had any other basis. Its review revealed a "demonstration by proof or admission of the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case . . ." in the context of a *criminal* case in which the transfer asked for was to the home district of the defendant (Pet. 30-31).

We have shown (pp. 4-11, *supra*) that the appellate court's appraisal of the record facts is not inconsistent with petitioner's findings. But even if the appellate court had reached its conclusion, as the petition implies (Pet. 2, 14), on the basis of *de novo* findings, the decision would have been perfectly proper. The record here is documentary; the district court would have no special advantage in

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[5] The Seventh Circuit had previously held that consideration of improper factors of the "interest of justice" was an abuse of discretion. *Dairy Industries Supply Ass'n* v. *LaBuy*, 207 F. 2d 554, 558 (7th Cir. 1953).

evaluating it, even if the facts were conflicting. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-396 (1948). But the facts of this record are completely one-sided: there are virtually no relevant record facts weighing against transfer;[6] the record weighs so overwhelmingly on the side of transfer that the interest of justice, the essential and sole criterion of Criminal Rule 21(b), required transfer as a matter of law.

Petitioner's refusal to transfer on this record, if allowed to stand, would amount to judicial repeal of Rule 21(b). In the last analysis there is nothing to support trial in the transferor forum beyond the fact that it is the forum the prosecution chose. But a principal purpose of Rule 21(b) was the elimination of gross injustices formerly produced by allowing the prosecution an absolute right to choose the forum in multi-venue conspiracy cases, particularly anti-trust cases. The resulting abuses were described by Judge Medalie, a member of the Advisory Committee which drafted the revision of the Criminal Rules, as " . . . pretty shabby business for the great government of the United States to indulge in. . . . If, for example, a business' headquarters are in Chicago, everybody is there, every

[6] The trial court observed that "without a doubt" the case could be tried sooner in Danville than Minnesota (DCO 33). While the state of the dockets may be of importance in a case where one is congested and the other not, we submit that it should not be determinative, or even important, in a situation where the dockets in both courts are current (Pet. App. 24; see p. 9, *supra*), especially in the face of a record showing that all other relevant factors strongly favor one forum over the other. And, certainly, the comparative status of dockets in the two forums is a question that can be determined as well by the appellate as by the district court.

book and record is there, practically every witness is there on both sides, then try it in Chicago. That is the decent thing to do and accords better with the dignity of our great government. . . ." *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 395-398 (S.D. Cal. 1947); see also, *United States* v. *E. I. duPont deNemours & Co.*, 83 F. Supp. 233, 234 (D.D.C. 1949); *Krulewitch* v. *United States*, 336 U.S. 440, 452-453 (1949) (concurring opinion).

In the light of the purpose of Rule 21(b) and the nature of the record before it, it is hardly surprising that the court of appeals determined as a matter of law that this case should be transferred.[7] Any other decision would have wrought injustice in this case and, if followed, would have nullified Rule 21(b)'s usefulness as the "valuable tool of justice" which this Court has recognized it to be. *United States* v. *Cores*, 356 U.S. 405, 410 (1958).

No record justification can be found for sending this case back to petitioner for further consideration. What could petitioner reconsider on remand? The "fair trial" issue removed, can it be seriously suggested that moving nine ordinary-sized file boxes to St. Paul outweighs the extreme inconvenience, expense, and handicap in its trial preparation that denial of transfer would create for defendant: the transportation of documents, witnesses, and attorneys to Danville; the substitution of the long-distance telephone for personal contact between attorneys and client in the preparation for and conduct of trial; the disruption of its

[7] "The effect of admitted facts is a question of law." *Nelson* v. *Montgomery Ward Co.*, 312 U.S. 373, 376 (1941); see also, *Exmoor Country Club* v. *United States*, 119 F. 2d 961, 963 (7th Cir. 1941). The language of Rule 21(b) is mandatory that the case *"shall"* be transferred if transfer is "in the interest of justice."

normal business operations while executives having knowledge of matters in issue move to Danville for the duration of a lengthy trial?[8] Or that defendant's demonstration that a St. Paul trial will result in a cost saving of a minimum of $100,000 may, after due deliberation, be outweighed by the purely assertive and speculative saving that might accrue to the Government if it were allowed to transport witnesses from undisclosed locations to Danville rather than to St. Paul?

Indeed, only by adopting the philosophy urged to both courts below and given credence in petitioner's opinion (DCO 30, 33), that defendant because of its size and the magnitude of its financial transactions is not entitled to the benefit of considerations ordinarily determinative of the interest of justice, could a decision contrary to that of the court of appeals be reached on this record. We are confident that the Court will reject the suggestion that Rule 21(b) incorporates a dual standard which would make it unavailable to defendant. As Judge Yankwich pointed out, the rule embodies the same standard of justice "whether the defendant be poor or rich, a small or a large corporation. Neither the rules nor our system would justify the elimination of any of these elements merely because

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[8] See *United States* v. *General Motors Corp.*, 194 F. Supp. 754, 756 (S.D. N.Y. 1961) and *United States* v. *American Natural Gas Co.*, 1959 Trade Cas. ¶69,265 at p. 75,034 (E.D. Wis. 1959). As Judge Tehan pointed out in the *American Natural Gas* case: "No one who has had experience in protracted litigation involving important stakes such as are involved here can be at all realistic and not recognize the need and value of close contact between clients, officers of corporations, and records, and attorneys immediately prior to and during the course of the trial."

the defendants . . . may be persons of great wealth or corporations with large resources." *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 397 (S.D. Cal. 1947).

B. The Form of the Writ of Mandamus is a Matter Properly Within the Discretion of the Appellate Court, and the Appellate Court Did Not Abuse Its Discretion By Directing Transfer of This Case.

This case is one affecting the continued vitality of Criminal Rule 21(b) as a "valuable tool of justice." *United States* v. *Cores*, 356 U.S. 405, 410 (1958). The Court has made it clear that in such exceptional cases, especially when misapplication of rules promulgated by this Court is involved (*McCullough* v. *Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Co.* v. *James*, 272 U.S. 701, 706 (1927)), the appellate courts can and should exercise a proper and necessary "supervisory control" over the district courts. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957). Because injustices effected through erroneous application of Rule 21(b) cannot be adequately remedied after trial, they present situations particularly appropriate for the exercise of mandamus.

The claim here that "once the error [in the initial decision] was laid bare" the court of appeals should have remanded to petitioner for further consideration (Pet. 12) finds no support in the record here or in the law. There is no "established judicial procedure" supporting this position (Pet. 12). Indeed, the question posed here by petitioner was considered only recently by the Court of Appeals for the Second Circuit in *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 297 F. 2d 80, 90 (2d Cir. 1961), *cert. denied* 368 U.S. 986 (1962). Under the facts of that case the

court concluded that it was necessary to direct, through writ of mandamus, that an order of a district court be vacated insofar as it was based on an improper consideration. The court found that it then had to consider the form that the writ should take: "we must now decide whether we should so limit our decision [to the improper consideration by the district court] *or should also pass upon the other issues* . . . to the full extent the record will permit, although we might not have considered mandamus if they had stood alone." 297 F.2d at 90 (emphasis supplied). The court concluded that it could "lawfully pursue either course" but that it was preferable for it to review the entire record in order to prevent further delay, and because "we see no purpose in a . . . [remand], when all material needed for . . . disposition is before us, and, in our view, any determination in [respondent's] favor by the District Court would ultimately have to be reversed as erroneous in law." 297 F. 2d at 90.

The only authority the petition cites on this point is an opinion written by the court whose decision here is under attack. In that case, *Chicago R. I. & Pac. R.R.* v. *Igoe*, 212 F.2d 378, 382 (7th Cir. 1954), the Seventh Circuit, by writ of mandamus, directed a district judge to reconsider his denial of a transfer motion in a civil action. The denial had been based on an improper consideration and there had been no consideration of relevant record facts, so that the abuse of discretion was clear without further examination of the record. On remand the district judge again denied the motion, this time on the basis of the record as a whole. Another application for mandamus was made, and

the court of appeals examined the record. It found that the case was brought in a district which had "no relation to the litigation . . .", whereas "the balance of convenience of the parties" was "so overwhelmingly in favor of the defendant that . . . the denial . . . of the motion to transfer . . . was so clearly erroneous that it amounted to an abuse of discretion." *Chicago, R. I. & Pac. R. R.* v. *Igoe,* 220 F. 2d 299, 304, 305 (7th Cir.), *cert. denied* 350 U.S. 822 (1955). Accordingly, the court by mandamus directed the district judge to transfer the action. With respect to the statement in its earlier decision quoted by petitioner here (Pet. 14), the court said, "all we intended to say was that the District Court must, *initially,* make the decision *by applying the statutory tests* . . ." 220 F.2d at 302 (emphasis supplied). "We thought we clearly delineated the scope of our [earlier] decision," the court added, "when we stated: 'however, this opinion deals with the existence of power [to issue the writ] only, not with the permissible limitations on its exercise.' " 220 F. 2d at 302.

The record in the present case, in which all of the record facts were initially considered by petitioner, parallels the record of the second *Igoe* case, and of the *Lummus* case, and as the appellate court recognized, requires identical disposition. There was no error, still less abuse, in the appellate court's exercise of its discretion under the All Writs Act and the petition for certiorari should accordingly be denied.

II. The Appellate Court's Decision Can Not Have the Effect of Requiring That All Defendants in Multi-Venue Criminal Cases Be Tried in Their Home Districts.

The decision of the court of appeals could not have the effect, prognosticated by the dissenting judge (Pet. 36-37) and, with less conviction, concurred in by the petition (Pet. 16), of determining that every defendant in a criminal case is entitled to be tried in the vicinage of its home office. While great weight should be given to the fact that transfer was sought to its home district, that fact was only one reason—a cumulative one—for transfer. This action was arbitrarily brought in a district with which it has no real connection. Defendant supported its motion to transfer with an overwhelming factual showing, in terms of convenience to the parties and witnesses and substantial lessening of trial expense, favoring transfer to Minnesota. Transfer should have been allowed under these circumstances whether or not the transferee district was the home district of the defendant.

Far from confusing "two quite different doctrines," as the petition suggests (Pet. 16), the court of appeals' transfer of this case to the vicinage of defendant's home office carried out the essential purposes of Rule 21(b) and reached, in the words of this Court in *United States* v. *Cores*, 356 U.S. 405, 410 (1958), a "result . . . entirely in keeping with the policy of relieving the accused, where

possible, of the inconvenience incident to prosecution in a district far removed from his residence.'"

Defendant makes no claim that this established policy favoring trial in the defendant's home district is absolute. It does not operate unless venue lies in the defendant's home district, and even so, the facts may on balance show that it is not in the interest of justice to have the trial there. There is no possibility that the decision that petitioner asks the Court to review could change that settled law or in any way increase the weight to be given to the home district factor in future transfer cases. The opinion of the court of appeals holds simply that when there is no reason other than a minimal showing of venue for having the trial in the district in which it was brought and

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[9] This policy has, as the court of appeals recognized, ancient origins in the common law. Particularly is it foundational to American legal traditions. The Declaration of Independence cited among the wrongs wrought by George III those "depriving us . . . of the benefits of Trial by Jury [and] . . . transporting us beyond the Seas to be tried . . . " and the reference was to the proposal by Parliament that Americans be tried abroad or in other American colonies for crimes committed in their own colonies, about which "the Virginia Resolves of May 16, 1769, voiced the unanimous view that 'thereby the inestimable Privilege of being tried by a Jury from the vicinage, as well as the Liberty of summoning and producing Witnesses on such Trial, will be taken away . . .'" *Johnston* v. *United States*, 351 U.S. 215, 224 (1956) (Mr. Justice Douglas dissenting); see also, 2 Story, Constitution, Sec. 1781 (5th ed.). In *United States* v. *Johnson*, 323 U.S. 273, 276, 278 (1944), this Court pointed out that "the underlying spirit of the constitutional concern for trial in the vicinage" required the avoidance of statutory constructions allowing venue "in places remote from home." See also, *Hyde* v. *Shine*, 199 U.S. 62, 78 (1905).

there are overwhelming reasons of convenience and cost saving for holding the trial in the home district of the defendant, the case should be transferred.[10] This is hardly a startling legal proposition or one that could prove "unsettling and disruptive in multi-venue criminal cases," as the petition avers (Pet. 17). It is rather a minimal statement of what is required by "the interest of justice" under Rule 21(b).

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[10] The result reached by the court of appeals is entirely consistent with the judicial application of Rule 21(b) in earlier cases involving transfer to a defendant's home district. *E.g.*, *United States* v. *General Motors Corp.*, 194 F. Supp. 754, 756 (S.D. N.Y. 1961); *United States* v. *Cashin*, 281 F. 2d 669, 675 (2d Cir. 1960); *United States* v. *Olen*, 183 F. Supp. 212, 217 (S.D. N.Y. 1960).

CONCLUSION.

Because the decision of the court of appeals below is correct, is consistent with the decisions of this and other federal courts, and does not present an important federal question, defendant respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,
v.
MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant.

CRIMINAL ACTION
No. 61-73-D

MEMORANDUM AND ORDER

The defendant presents a motion in accordance with Rule 21(b), Fed. Rules Crim. Proc., 18 U.S.C.A., for the transfer of this case to the United States District Court for the District of Minnesota. Defendant's counsel, in their brief and argument, stress transfer to St. Paul, Third Division. (28 U.S.C.A. §103(3)). The defendant has filed affidavits in support of its motion and the Government has filed affidavits in opposition thereto. Both the Government's counsel and defendant's counsel have filed briefs and argued their position orally, ably, and at great length.

The Government has stipulated that the offense charged in the indictment "was committed" in the Eastern District of Illinois, the District of Minnesota, and the Northern District of Illinois. Therefore, Rule 21(b) is appropriate as a basis for the motion in this case.

Under Rule 21(b) it is necessary in the determination of the motion to transfer that the Court determine from the facts and circumstances whether it is satisfied "that in the interest of justice the proceedings should be transferred." Once a court is satisfied that it would be "in the interest of justice" to transfer under Rule 21(b) it becomes obligatory upon the court to enter an order of transfer.

The term "in the interest of justice" is broad in its meaning. It requires an examination of many factors as criteria in determining the defendant's motion. The defendant in its brief sets out these factors as follows:

1. Location of corporate defendant.
2. Location of possible witnesses.
3. Location of events likely to be in issue.
4. Location of documents and records likely to be involved.
5. Disruption of defendant's business unless the case is transferred.
6. Expense to the parties.
7. Location of counsel.
8. Relative accessibility of place of trial.
9. Docket condition of each district or division involved.
10. Any other special elements which might affect the transfer.

A review of these factors should determine whether the case should be transferred. See United States v. National City Lines, D.C.S.D.Cal., 1947, 7 F.R.D. 393. The Court will discuss each factor, taking into consideration the facts set out in the affidavits, briefs, and oral argument. Furthermore, the Court will at all times keep in mind that the defendant is to be considered innocent of the charge in the indictment.

The indictment in this case charges the defendant, in nine counts, with violations of §§1 and 2 of the Sherman Act, 15 U.S.C., by the unlawful manipulation or misuse of patents. The first three counts set the pattern for counts four, five, six, and seven, eight, and nine. The first three counts are concerned with pressure sensitive tapes. Count one charges the defendant and others with an attempt to

monopolize the flow of pressure sensitive tapes in the United States and in foreign countries. Count two charges the defendant with conspiracy in restraint of trade or commerce among the several states etc. 15 U.S.C. §1. Count three charges the defendant with conspiracy to monopolize trade or commerce among the several states etc. 15 U.S.C. §2. Counts four, five and six are similar, but the charges are in regard to magnetic recording media. Counts seven, eight, and nine refer to aluminum presensitized lithographic plates.

LOCATION OF DEFENDANT AND CO-CONSPIRATORS

The defendant is a corporation, organized under the laws of Delaware, and has its principal place of business in St. Paul, Minnesota. It has been located there since about 1911. Its main research laboratory and several manufacturing plants are all in and about St. Paul; thirty-three plants and twenty branch sales offices are located outside Minnesota.

The co-conspirators named in the indictment, with their location, are as follows:

Johnson & Johnson	New Brunswick, New Jersey
Permacel-LePage's, Inc.	New Brunswick, New Jersey
Permacel Tape Corporation	New Brunswick, New Jersey
Industrial Tape Corporation	New Brunswick, New Jersey
The Revolite Corporation	New Brunswick, New Jersey
The Kendall Company	Boston, Massachusetts
Norton Company	Worcester, Massachusetts
The Seamless Rubber Company	New Haven, Connecticutt
Johns-Manville Corporation	New York, N. Y.
A. B. Dick Company	Niles, Illinois
Armour Research Foundation of Illinois Institute of Technology	Chicago, Illinois

POSSIBLE WITNESSES

Defendant states "twenty-four former or present employees of alleged co-conspirators testified before the grand jury or were interrogated informally by government counsel in Chicago. Of these, at least eleven reside in New Jersey or New York within reasonable proximity to the New York metropolitan area, four are from Massachusetts, four are from the Chicago area, and two or three spend their time between Florida or Arizona and the Eastern seaboard." The location and number of other witnesses before the grand jury, excepting 3M personnel, are as follows:

"St. Paul, Minnesota	(1)
Chicago, Illinois area	(2)
New York City area	(8)
Boston, Massachusetts	(2)
Philadelphia, Pennsylvania	(1)
Reading, Pennsylvania	(1)
Kansas City, Missouri	(1)
San Francisco, California	(1)
Los Angeles, California	(1)
Miami, Florida	(1)"

The Government, through its attorney, Mr. Earl Jenkinson, states in his affidavit that "while [he] will not reveal their home locations, he will state that a substantial number of the government's witnesses live within a 300 mile radius of Danville, Illinois, whereas only one or two of its presently contemplated witnesses live within a 300 mile radius of St. Paul-Minneapolis, and they are minor witnesses. Danville is substantially closer and more con-

venient for the majority of the key government witnesses." Thus, it appears that those witnesses who are officers or employees of the defendant will find it more convenient if the case was transferred to Minneapolis-St. Paul, but as to other witnesses the question of convenience is not so easily determined.

LOCATION OF EVENTS LIKELY TO BE IN ISSUE

In the main the indictment charges the defendant with improper use of its patents in coercing competitors to accept patent license agreements on illegal terms by suing or threatening to sue for infringement. The Government states one of these patent infringement suits was tried in this District at East St. Louis, and that others occurred in various parts of the United States. The defendant insists that it was an involuntary party plaintiff in the East St. Louis action. The defendant states that more activities by the defendant in relation to patents occurred in the District of Minnesota, where its patent attorneys are located, than in the Eastern District of Illinois. It is difficult for this Court to determine without the disclosure of evidence by both Government and defendant where the greater number of these negotiations took place. The defendant contends that venue on all counts does not exist in the Eastern District of Illinois. The indictment alleges venue in the Eastern District of Illinois. The defendant would not suffer if the Government would fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed.

DOCUMENTS

The Government now has nine large heavy corrugated boxes, 24 inches long, 15 inches wide, and 13 inches deep containing documents relative to this cause in the Clerk's

office in Danville, Illinois. Over 15,000 of these documents were obtained from the defendant. The other documents which the defendant might use at the trial are located in St. Paul. It would be an inconvenience for the defendant to locate and transport the necessary documents which it might use at the trial to Danville. On the other hand, the Government would be required to transport its documents to Minneapolis-St. Paul. No claim is made that the documents which the defendant might use will be indispensable to defendant's day to day operation of its business.

DISRUPTION OF BUSINESS OF DEFENDANT

There can be little doubt that if the trial occurred in St. Paul there would be less disruption of defendant's business. Consultation preparatory for trial between defendant's officers and employees and counsel could be conducted at St. Paul, wherever the trial occurred. Consultation during the trial could be conducted by telephone whether the cause was tried in St. Paul or Danville. Naturally, counsel could talk in person with defendant's officers and employees if the trial were held in St. Paul. The trial will take considerable time wherever the case is tried and it will require some of defendant's officers and employees to take time from defendant's business, but when consideration is given to the size of defendant's operation, the number of its plants, and their locations, the interruption of defendant's business should not be too great.

EXPENSES TO PARTIES

If the trial were held in the Eastern District of Illinois rather than in St. Paul, the home District of the defendant, it would be more expensive to the defendant. The defendant would be required to hire local counsel if the case were tried in Danville, but could use its local general counsel in

St. Paul. In St. Paul, defendant states, office space for defendant's attorneys could be easily supplied without cost, but not in Danville. The witness fees to be paid by the Government would be less in total amount if the case were tried in Danville, for the reason that Danville is more centrally located than St. Paul. The expense to the defendant for transporting its officers and employees as witnesses would be a lesser amount if the cause were tried in St. Paul. The Government contends that it will not be required to rent office space in Danville because the United States District Attorney for the Eastern District of Illinois has office space available. Possibly the United States District Attorney in St. Paul would make space available to counsel for the Government.

LOCATION OF COUNSEL

The Government attorneys are located in Chicago, and Mr. Chadwell and Mr. McGee, who have appeared for the defendant in this case, are also located in Chicago. The defendant's legal department and its retained patent lawyers are located in St. Paul. Danville can be easily reached from Chicago, Illinois, by automobile, air, or train.

ACCESSIBILITY OF PLACE OF TRIAL

Defendant maintains that St. Paul is more accessible for all the witnesses and attorneys. There are direct air flights from New York to Minneapolis-St. Paul, and this might accommodate the witnesses from Metropolitan New York. This distance to Minneapolis-St. Paul would be greater than if the witnesses traveled from the New York area to Chicago, and then to Danville. There are more rail and air connections between Chicago and St. Paul than between Danville and Chicago. Danville has an airport which will accommodate most all piston planes. It has

a schedule of flights from Chicago to Danville and return as follows:

Chicago to Danville 10:25 a.m. arrive 11:29 a.m.

Chicago to Danville 3:15 p.m. arrive 4:51 p.m.

Chicago to Danville 6:30 p.m. arrive 7:34 p.m.

Danville to Chicago 7:53 a.m. arrive 8:55 a.m.

Danville to Chicago 11:24 a.m. arrive 12:24 p.m.

Danville to Chicago 4:48 p.m. arrive 5:50 p.m.

The train service from Chicago to Danville and return is as follows:

Chicago & Eastern Illinois Railroad—

Lv. Chicago 3.45 p.m. arrive 5:54 p.m.

Lv. Chicago 8:00 p.m. arrive 10:20 p.m.

Lv. Chicago 10:45 p.m. arrive 12:56 a.m.

Lv. Danville 7:00 a.m. arrive 9:05 a.m.

Lv. Danville 5:00 p.m. arrive 7:50 p.m.

Air travel is on Daylight and Eastern Time and train travel is on Standard Time.

Danville is also 86 miles from Indianapolis, Indiana, and about 60 miles from Terre Haute. Plane, bus, or train connections could be made from Terre Haute to Danville, and plane and bus connections from Indianapolis.

The Wabash Railroad Company has two trains a day into Danville from St. Louis, Missouri, and two from Detroit, Michigan.

There are also excellent hardroads in all direction to Danville and especially from Chicago. With the excellent

roads between St. Paul and Danville, without entering the heavy traffic in Chicago, the trip can be made by automobile in about twelve hours. This Court has driven this route in twelve successive hours.

Witnesses are usually interviewed by counsel before they take the witness stand. Witnesses could easily arrive in Danville the night before they were to be used, thus, giving counsel an opportunity to interview the witness before the witness is used.

The defendant also operates its own planes. These could be used for transportation of counsel, officers, and employees of the defendant, as well as for the purpose of transporting necessary documents. It probably would not take more than three hours to fly from St. Paul to Danville, a distance of approximately 500 miles.

DOCKET CONDITION

The docket in Danville, without a doubt, would provide a trial at an earlier date than in the Minnesota District. At the present time there are but two criminal trials pending on the Danville docket, and these are set for trial September 19 and 20.

SPECIAL ELEMENTS OF HARDSHIP

From the affidavit of Mr. William L. McKnight, Chairman of the Board of defendant, it appears he is the gentleman who is mainly responsible for the phenomenal growth of 3M. No doubt he is a most capable and fine gentleman. His physical condition, unfortunately, may be somewhat taxed by his attendance at the trial whether the trial occurs in St. Paul or Danville. The newspaper clippings displaying photographs, exhibited to the Court by Government's counsel, show that Mr. McKnight was able to attend a dance and to look after his racing stable last Feb-

ruary. He had a serious operation in March, 1961 but apparently has recovered and is now in substantially good health. While this Court feels most kindly toward a man of Mr. McKnight's age, it is this Court's opinion that he could make himself most comfortable in one or the other of Danville's hotels, or at the new Holiday Inn Motel which will soon be ready for occupancy, and is only one block from the federal building.

There is one other item which cannot be overlooked in passing upon this motion. For more than 50 years 3M has had many employees and stockholders in the St. Paul area. 3M has grown from a small corporation to an industrial giant while located in the St. Paul area. Its officers and employees have been active in civic affairs. They hold official positions in over thirty-three financial, civic, and educational institutions. All of these activities are to the credit of 3M, but at the same time when one considers the number of contacts that its employees and stockholders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on any citizen in the area called for jury service. It also must be noted that the charge in the indictment is a misdemeanor, and that the Government and the defendant each have but three peremptory challenges. Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A. Counsel for the defendant, in his argument, has made the suggestion that the jury might be drawn from outside the counties of Ramsey and Hennepin where there isn't the concentration of officers, employees, and stockholders of 3M. The influence of 3M and its personnel would probably make itself felt among the citizens in the counties adjacent to Ramsey County where St. Paul is located and to Hennepin County where Minneapolis is located. These facts are

material in determining where the cause should be tried. See United States v. Hoffa, D.C.S.D. Fla., 1962, 205 F. Supp. 710, 722. It would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois.

This Court has carefully reviewed the facts and circumstances relating to the transfer of this case "in the interest of justice." Some facts mentioned by counsel have not been noted in order not to lengthen this memorandum. The Court has concluded that "in the interest of justice" the cause should be tried in the Eastern District of Illinois.

Therefore, the motion to transfer is denied.

IT IS SO ORDERED.

Entered this 31st day of August, 1962.

Casper Platt
United States District Judge